IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 829 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NATVARLAL HIRALAL WAGHELA

Versus

STATE OF GUJARAT,

Appearance:

1. Special Civil Application No. 829 of 1993

MR BM TRIVEDI for Petitioner No. 1

Mr.N.D.Gohil, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 13/09/2004

ORAL JUDGEMENT

Though called out twice, learned Advocate for the petitioner was absent.

1. In the present petition, the petitioner has challenged the order/notice dated 8-1-1993 by which the Government in exercise of powers under Clause (aa) of sub-rule (1) of Rule 161 of the Bombay Civil Services Rules directed that the petitioner shall retire from service from the date on which the order is delivered to him. The said order also provides that the petitioner shall be paid a sum equivalent to his pay and allowances for three months in lieu of three months notice.

2. It is the case of the petitioner that a Special Case no.15/1989 is pending against him for which he was placed under suspension. The petitioner filed Special Civil Application no.5387/1992 for a direction that the Government should not proceed with the Departmental Inquiry initiated against the petitioner till final disposal of the Special Case no.15/1989. In the said Special Civil Application no.5387/1992, the Assistant Government Pleader made a statement that till the criminal case filed against the petitioner, namely, Special Case no.15/1989 is not finally concluded, the Departmental Inquiry initiated against the petitioner will not be proceeded with. In view of the said statement of the learned A.G.P., the petitioner withdrew the petition. It is the case of the petitioner that by the impugned order/notice dated 8-1-1993, the petitioner is ordered to be prematurely retired from service which according to the petitioner is illegal and unlawful. The petitioner has challenged the said order on various grounds including the ground that the Committee had not applied its mind, and that the impugned order is not a speaking order since no reasons are indicated. The petitioner has also stated that he has not received any adverse remarks and that, therefore, also the decision is improper. The petitioner has also contended that since the Special Case no.15/1989 is pending in the Special Court at Baroda, the impugned order to retire the petitioner prematurely could not have been passed.

3. The respondents have in response to the notice of this Court appeared and filed an affidavit-in-reply dated 31st March,1993. In the said affidavit, it is contended inter alia that the petitioner has no fundamental right to continue in Government service after completion of 50 years of age and if the Government is of the opinion that it is not in the public interest to continue the petitioner in service such an order can be passed in exercise of powers under Rule 161 of the Bombay Civil Services Rules. It is further stated that the case of the petitioner for being continued beyond the age of 50

years was considered by the Review Committee consisting of the responsible officers of the State Government. The Review Committee having considered the service record of the petitioner, and having given more importance to the record of last 10 years was of the view that the petitioner should be prematurely retired from service as his retention is not in public interest. The recommendations of the Review Committee were duly considered by the Government and the Government having agreed to the recommendations eventually the impugned order came to be passed.

3. In the said affidavit, the respondents have also contended that upon perusal of the relevant service record of the petitioner, it was found that the petitioner was lacking energy and initiative in performance of his duties. He was unable to control his subordinates and his performance was poor. It was also found that his integrity was doubtful. It was also noticed that the petitioner was involved in a corruption case and he was facing prosecution. It was also contended that the petitioner has committed serious financial irregularities, and he was facing inquiry with regard to the same. It was also noticed that an ACB trap was laid pursuant to which the petitioner was caught red-handed. Upon overall perusal of the service record of the petitioner, the Review Committee was convinced that it was not in public interest to continue the petitioner in active service, and the Review Committee, therefore, recommended his premature retirement. It is clarified that the petitioner is not retired from service by way of punishment, and that he will be getting all his retiral benefits as if he had retired in normal course. It is, therefore, contended that the impugned order having been passed not by way of punishment, the same may be upheld.

4. The law on the question of power of the Government to order premature retirement of a Government Servant on happening of a certain event is by now well settled. The Honourable Supreme Court in the case of BAIKUNTHA NATH DAS AND ANOTHER v. CHIEF DISTRICT MEDICAL OFFICER, BARIPADA AND ANOTHER reported in (1992) 2 Supreme Court Cases 299, held that an order of compulsory retirement is not a punishment and implies no stigma against the Government servant. The order has to be passed on forming an opinion that it is in public interest to retire the Government servant compulsorily, and the order is passed on the subjective satisfaction of the Government. It is further held in the said decision that the principles of natural justice have no place in

the context of an order of compulsory retirement. It is also held that the order of compulsory retirement is not liable to be quashed merely on the showing that while passing the order, uncommunicated adverse remarks were taken into consideration. Para 34 of the said decision is reproduced below:

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is

based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above".

5. In the decision of the Honourable Supreme Court in POST AND TELEGRAPHS BOARD AND OTHERS v. C.S.N.MURTHY reported in 1992(2) SCC 317, the Honourable Supreme Court relying on the earlier decision of BAIKUNTHA NATH'S case (supra), observed that in absence of any material showing mala fides, perversity, arbitrariness or unreasonableness, the High Court erred in setting aside the order of compulsory retirement.

6. In the decision of the Honourable Supreme Court in the case of UNION OF INDIA v. V.P.SETH AND ANOTHER, reported in AIR 1994 SC 1261, relying on the above decisions of BAIKUNTHA NATH'S case (supra) and POST AND TELEGRAPHS case (Supra), the Honourable Supreme Court observed that the Rule of audi alteram partem is not applicable to an order of compulsory retirement and an order of compulsory retirement can be made subject to judicial review only on grounds of mala fides, arbitrariness or perversity. In paragraph 3 of the said decision, the Honourable Supreme Court made the following observations:

"These principles were reiterated with approval in the subsequent decision. It would, therefore, seem that an order of compulsory retirement can be made subject to judicial review only on grounds of mala fides, arbitrariness or perversity and that the rule of audi alteram partem has no application since the order of compulsory retirement in such a situation is not penal in nature. The position of law having thus been settled by two decisions of this Court, we are afraid that the order of the Tribunal cannot be sustained as the same runs counter to the principles laid down in the said two decisions".

7. Keeping the above judicial principles in mind, if we peruse the present case, it is clear from the affidavit-in-reply filed by the respondents that the case of the petitioner was considered by the Review Committee to decide the question of his retention in service after the age of 50 years. The Review Committee having regard to the service record of the petitioner came to the conclusion that the petitioner's retention in service is not in public interest. The respondents have in their affidavit-in-reply detailed the reasons for the Committee to have come to such a conclusion. The recommendations of the Committee were agreed to by the Government. The reasons that weighed with the Review Committee and were accepted by the Government cannot be termed as perverse or arbitrary. As held by the Honourable Supreme Court in the above mentioned decisions, the order of the Government deciding to prematurely retire a Government servant upon reaching the age of 50 years or upon completion of certain number of years of service can be challenged only if the order is found to be mala fide, perverse or utterly unreasonable. In the present case, no mala fides have been established. The Review Committee having considered his service record, and having taken into account all the relevant material, it would not be possible for this Court to overrule such a decision in exercise of powers under Article 226 of the Constitution, since no perversity or unreasonableness is pointed out by the petitioner.

8. The contention of the petitioner that the order not being a speaking order, could not stand the test of law, is not borne out from any judicial decision. In fact, the above mentioned decisions of the Honourable Supreme Court suggests that an order of premature retirement passed by the Competent Authority can be questioned only on the grounds of mala fides, arbitrariness or perversity. The fact that a criminal case is pending against the petitioner also cannot be pressed into service to challenge the order of premature retirement. No legal provision or decision has been pointed out by the petitioner in support of this contention. A criminal case has an entirely different purpose and the competent criminal Court would give a proper conclusion on the basis of evidence led before it and would decide whether the petitioner is guilty of having committed any criminal act or not. The purpose of ordering premature retirement of a Government servant is entirely different, and it is ordered by the Government when the Government upon consideration of the material on record comes to the conclusion that the Government

servant has become a dead wood, and therefore, his retention in active service is no longer in public interest. Pendency of the criminal case, therefore, cannot come in the way of Government in passing the order of premature retirement.

9. In the conclusion, I find that the petitioner has not been able to demonstrate any illegality in the impugned order of premature retirement. The petition is, therefore, devoid of merits, and is hereby rejected. Rule is discharged. No orders as to costs.

(Akil Kureshi,J.)

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